STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1694-1, AFL-CIO,	)	
Charging Party,	)	
	)	**ULP 14-10-982**
v.	)	**Interim Decision on Preliminary Issue**
DIAMOND STATE PORT CORPORATION,	)	
Respondent.	)	

BACKGROUND

The Diamond State Port Corporation (DSPC) is a public employer within the meaning of 19 Del. C. §1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 ("PERA").

The International Longshoremen's Association (ILA) is an employee representative within the meaning of 19 Del.C. §1302(i). By and through its affiliated Local 1694-1 (Local 1694-1), the ILA is the exclusive bargaining representative of a bargaining unit of DSPC employees within the meaning of 19 Del.C. §1302(j).

At all times relevant to the processing of this Charge, the ILA and DSPC have been parties to a collective bargaining agreement, which has a term of October 1, 2010 through September 30, 2013. The parties engaged in negotiations for a successor agreement. As of the date of this determination, the parties have not mutually agreed upon a successor agreement.

On October 28, 2014, Local 1694-1 filed an unfair labor practice charge with the Public Employment Relations Board (PERB) alleging DSPC engaged in violation of §1307(a)(1), (a)(2) and (a)(5) of the PERA. Specifically, the Local 1694-1 alleges DSPC has failed to provide

information it requested which was relevant and necessary for the union to "formulate proposals and make intelligent bargaining decisions" during the course of collective bargaining. Consequently, by this course of conduct, DSPC has interfered with the rights of bargaining unit employees and with the representational obligations of Local 1694-1.

On November 24, 2014, DSPC filed its Answer denying the material allegations of the Charge.

A probable cause determination was issued on December 12, 2014, which held:

> The pleadings constitute probable cause to believe that an unfair labor practice, as alleged, may have occurred.
>
> The parties are directed to provide expedited argument concerning whether there is a continuing duty to provide information following initiation of the binding interest arbitration process under 19 Del.C. §1315. This issue will be decided as a preliminary matter.
>
> If it is determined that the duty to provide information continues after initiation of the binding interest arbitration process, a hearing will be convened for purposes of creating a record on which a determination can be made as to whether the employer did, in fact, violate its statutory obligations.

Argument concerning the continuing duty to bargain was received from the parties, with DSPC's opening brief received on January 7, 2015, the ILA's answering brief received on January 16, 2015, and DSPC's responsive brief received on January 23, 2015.

This decision is based upon review and consideration of the argument of the parties as well as related case law established by and before this Board.

ISSUE

WHETHER THERE IS A CONTINUING DUTY TO PROVIDE INFORMATION UNDER THE PUBLIC EMPLOYMENT RELATIONS ACT AFTER THE INITIATION OF BINDING INTEREST ARBITRATION PURSUANT 19 DEL.C. §1315?

DISCUSSION

Since its very first decision in 1984, the PERB has "recognized the wisdom of refraining from attempting to fashion broad and general rules that would serve as a panacea", and following the wiser course to "resolve disputes on a case-by-case basis until there is developed, through experience, a sound basis for developing general principles."[1] In the seminal decision establishing the general obligation of an employer to provide information required by an exclusive bargaining representative to perform its representational responsibilities, the United States Supreme Court held the analysis must turn upon "circumstances of the particular case." [2]

This charge is specifically limited to consideration of the duty to provide information after the initiation of the binding interest arbitration process. It presents an issue of first impression. It is well established through PERB case law that the duty to bargain in good faith under the Public Employment Relations Act obligates a public employer to provide information to an exclusive bargaining representative that is necessary and relevant to that organization in performing its representational duty.[3] This obligation has been recognized by this Board, the Court of Chancery and the Delaware Supreme Court.[4] Failure by a public employer to meet the statutory obligation may be a violation of 19 Del.C. §1307(a)(1), (a)(2), and/or (a)(5).

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[1] *Seaford Education Assn. v. Bd. of Education*, ULP 02-02-84S, I PERB 1 (1984)

[2] *NLRB v. Truitt Mfg. Co.*, 351 US 149, 153 (1956)

[3] *AFSCME 320 & 1102 v. City of Wilmington*, ULP 10-08-761, VII PERB 4757, 4760 (Probable Cause Determination, 2010).

[4] *Bd. of Education of Colonial School District v. Colonial Education Association, DSEA/NEA,* Del.Chan., CA 14383 (1996*), affirmed Colonial Education Assn. v. Bd. of Education,* Del. Supr., Case 129, 1996, 152 LRRM 2575, III PERB 1519 (1996), (citing *Brandywine Affiliate, NCCEA/DSEA/NEA, v. Brandywine School District,* Del.PERB, ULP 85-06-005, I PERB 131, 149 (1986); *AAUP v. DSU,* Del. PERB., Decision on Remand, ULP 95-10-159, III PERB 2177 (2001); *Delaware Correctional Officers Association v. Delaware Department of Correction*, ULP No., 00-07-286, III PERB 2209, 2214 (2001), *AFSCME Locals v. DSU*, Del.PERB, ULP 10-04-739, VII PERB 4693, 4705 (2010); *Amalgamated Transit Union, Local 842 v. State of Delaware, Delaware Transit Corporation* ULP 12-02-850, VIII PERB 5493, 5497 (Probable Cause Determination, 2012); *ILA 1694-1 v. DSPC*, ULP 14-10-982, VIII PERB 6341, 6343 (Probable Cause Determination, 2014)

The full PERB addressed the purpose of the statute and the binding interest arbitration process in *Delaware State Troopers Assn., & State of Delaware, DSHS, DSP*[5]:

> Delaware's public sector collective bargaining statutes were created and adopted to promote harmonious and cooperative labor-management relationships and to support collective bargaining in order to protect the public by assuring the orderly and uninterrupted operations and functions of the public employer. Both labor and management are expected to approach negotiations in good faith with an intent to reach agreements which will facilitate effective and efficient operations. The rights and responsibilities granted by statute are mutual and premised on the concept that reasonable people (representing both the employer and the employees) should be able to identify and resolve issues within the collective bargaining framework. This Board (PERB) was established to support and promote this mutual dispute resolution process, not to provide an alternative to good faith negotiations or a process by which parties can delay and avoid negotiations.

The Board also adopted the logic of the Wisconsin Appeals Court in defining the purpose of the binding interest arbitration process:

> The overriding purpose of the final-offer procedure … is to induce the parties to make their own compromise by posing potentially severe costs if they do not agree. In other words, a successful final-offer procedure is one that is not used; one that induces direct agreement during the proceedings; or, using a less rigorous definition of success, one that substantially narrows the area of disagreement.[6]

Section 1315(a) of the PERA requires the Board make a determination after receiving a petition or recommendation to initiate binding interest arbitration "as to whether a good faith effort has been made by both parties to resolve their labor dispute through negotiations and mediation and shall certify the parties at impasse and authorize the initiation of binding arbitration procedures…" Section 1315(b) requires the Board to appoint an interest arbitrator

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[5] BIA 08-01-612, VI PERB 4297,4302, Bd. Review of the Binding Interest Arbitrator's Decision on Remand (2009).

[6] *DSTA & DSHS, DSP*, (Supra., p. 4303), citing *LaCrosse Professional Police Association v. City of LaCrosse, Wisconsin,* Petition 96-2741, Court of Appeals of Wisconsin, 212 Wisc 2d 90, 102; 568 NW 2d 20, 25; 157 LRRM 2876 (1997).

and states, "…Nothing herein shall prevent the parties from mutually agreeing to alternative methods to achieve a final and binding resolution of any impasse." Section 1315(g) states:

> Nothing in this chapter shall be construed to prohibit or otherwise impede a public employer and certified exclusive representative from continuing to bargain in good faith over terms and conditions of employment or from using the services of a mediator at any time during the conduct of collective bargaining. If at any point in the impasse proceedings invoked under this chapter, the parties are able to conclude their labor dispute with a voluntarily reached agreement, the Board shall be so notified, and all impasse resolution proceedings shall be forthwith terminated.

It would be counter to the purposes and intent of the PERA to find the parties are relieved of their duty to bargain in good faith during a period in which they are actively engaged in negotiations or "alternative methods to achieve a final and binding resolution" of their impasse. In this case, as in many other prior binding interest arbitration proceedings, the parties were engaged (with PERB facilitation) in a final effort to resolve their impasse. DSPC and the ILA had agreed to suspend the binding interest arbitration process during this period. Consequently, the binding interest arbitration hearing had not been scheduled, an arbitrator had not been appointed, and other matters pending before PERB which were directly related to the binding interest arbitration process were held in abeyance (including this unfair labor practice charge and a request for declaratory statement). The abeyance was open-ended, pending either resolution of the impasse and ratification of the new agreement, or failure of the process, at which time the binding interest arbitration proceeding would be reinstituted.

The binding interest arbitration decision in *FOP 15 v. Dover*[7] held that "once an impasse proceeds to the binding interest arbitration <u>hearing</u>, it is no longer a continuation of negotiations or mediation." *(emphasis added)*. The discussion continued:

[7] BIA 11-07-820, VII PERB 5345 (1/16/12).

> … Interest arbitration is the final stage of the impasse resolution procedure and is implemented only when the negotiation and mediation processes have failed and the parties have abdicated their statutory responsibility to collectively bargain to the arbitrator to determine the terms of the labor/management relationship for the period in issue.
>
> The arbitrator does not stand in the place of either negotiation team or act on behalf of either party. Positions which may foster or support movement toward resolution in negotiations and/or mediation (and are reasonable negotiating positions) may not stand up when evaluated under the statutory criteria for interest arbitration set forth in 19 Del.C. §1615(d).

The *Dover* decision did not reach back to the point at which the binding interest arbitration process was initiated; rather it delineated the hearing as the point at which the negotiation and mediation processes have failed. At least to the point that the arbitrator is appointed and the hearing proceeding commences, there is a continuing duty to bargain in good faith.

DSPC asserts NLRB case law holding impasse does not terminate an employer's obligation to provide information is inapplicable to proceedings before the Delaware PERB because there are no final impasse resolution procedures under the federal statute (NLRA) administered by the NLRB. It asserts that while impasse under the NLRA is only a "temporary deadlock or hiatus", impasse is defined by the PERA to be "the failure of a public employer and the exclusive bargaining representative to reach agreement in the course of collective bargaining." This argument ignores the express encouragement of §1315(g) to employers and unions to continue to bargain in good faith over terms and conditions of employment. The full PERB held on review in *DSHS, DSP v. Del. State Troopers Association*:[8]

> … 19 Del.C. §1615 (g) clearly states that the parties are always free, and encouraged, to resolve their impasse voluntarily: "[i]f at any point in the impasse proceedings invoked under this chapter, the parties are

[8] ULP 08-05-624, VI PERB 4067, 4070, Bd. Decision on Cross-appeals (2008).

> able to conclude their labor dispute with a voluntarily reached agreement, the Board shall be so notified, and all impasse resolution proceedings shall be forthwith terminated." Parties may always change their positions to reach an agreement at any point in the process. There is no point at which a final position is taken "which is not subject to change." For example, in this case, either party could advise PERB that it accepts the other party's offer, even though the BIA hearing has been concluded, argument made, and the record is before the arbitrator for decision. Should that occur, by statute, the impasse resolution process is terminated.

The duty of the exclusive bargaining representative to continue to represent the bargaining unit in good faith does not terminate upon the initiation of binding interest arbitration, nor does its duty to bargain in good faith, should the opportunity present itself. Nor does the employer's duty to bargain in good faith terminate at that point. "The open, honest and good faith exchange of information is a cornerstone of an effective relationship and is protected by the PERA."[9]

It is, therefore, determined there is a continuing duty to provide information which is reasonably necessary to the union's performance of its representational responsibilities under the PERA, consistent with the purposes of the statute and PERB case law. The specific circumstances and facts of this unfair labor practice case must now be considered. A request for information must be made in good faith and the response to that request must also be made in good faith.[10] The union has the initial burden to establish the relevance of the requested information. Although "the burden is not exceptionally heavy", there must be some proffer as to relevance.[11]

There is a presumption of relevance for information which relates to the

[9] AFSCME Locals 1007, 1267 & 2888 v. Delaware State University, ULP 10-04-739, VII PERB 4693, 4705 (2010).

[10] *IBEW Local 2270 v. Del. Transit Corporation*, ULP 14-01-941, VIII PERB 6001, 6006 (2014).

[11] *Boise Cascade Corporation and the United Paperworkers International Union, Local 900*, 279 NLRB 422 (NLRB 1986)

employer/bargaining unit employee relationship, and specifically relating to wages, benefits, hours, and other working conditions. An employer does not, however, have an obligation to provide information where the employer can demonstrate a request was made in bad faith. The NLRB has held:

> [W]here the request is for information with respect to matters occurring outside the unit, the standard is somewhat narrower (as where the precipitating issue or conduct is the subcontracting of work performable by employees within the appropriate unit) and relevance is required to be somewhat more precise. . . . The obligation is not unlimited. Thus where the information is plainly irrelevant to any dispute there is no duty to provide it.[12]

The National Labor Relations Board has also held that "relevance cannot be established by speculative argument alone without record evidence to support the applicability of these arguments to the present circumstances."[13]

Once the presumption of relevance is established, the burden shifts to the employer to respond in good faith in a reasonable and prompt manner.[14] The parties remain under a good faith obligation to attempt to resolve any issues concerning the scope of the request and/or method of production.[15]

Documents appended to the pleadings establish the scope and sequence of the ILA's information requests and DSPC's responses thereto. Whether this exchange meets the good faith obligation of the parties under the PERA requires further development of a factual record. Wherefore, an expedited hearing shall be immediately scheduled for the purpose of developing a factual record on which a determination can be made as to whether DSPC has violated 19 Del.C.

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[12] *Ohio Power Co.*, 216 NLRB 987, 991 (1975).

[13] *Rice Growers Association of California*, 312 NLRB 837 (1993), citing *Kentile Floors*, 242 NLRB 755, 757 (1979).

[14] *Tower Books*, 273 NLRB 671 (1984).

[15] *AFSCME, AFL-CIO Council 81, Locals 320 & 1102 v. City of Wilmington, Delaware***,** ULP No. 10-08-761 VII PERB 4867, 4882 (2011).

§1307 (a)(1), (a)(2), and/or (a)(5), as alleged.

DETERMINATION

For the reasons set forth above, it is determined that during the period of abeyance in the binding interest arbitration proceedings in which these parties were engaged in efforts to resolve their bargaining impasse, they were obligated under the PERA to bargain in good faith. The duty to bargain in good faith includes the duty to provide information which is reasonably necessary to the union's performance of its representational responsibilities under the PERA, consistent with the purposes of the statute and PERB case law.

An expedited hearing will be convened forthwith for the purpose of creating an evidentiary record upon which a decision can be rendered as to whether DSPC has failed or refused to meet its statutory duty to bargain in good faith and/or interfered with the rights of bargaining unit employees or Local 1694-1 by failing to produce information which is necessary and relevant for Local 1694-1 to meet its statutory duty to represent bargaining unit employees in collective bargaining.

Dated: February 9, 2015

Charles D. Long, Jr.

CHARLES D. LONG, JR., Hearing Officer
Delaware Public Employment Relations Bd.